FILE COPY

FILED
FEB 10 1958
JAMES R. BROWNING, Clerk

No. 693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

JOHN R. BENNEY,
Attorney for Petitioner,
3020 New Mexico Ave., N.W.,
Washington 16, D. C.

FRANK L. LAWRENCE,
Of Counsel,
351 California Street,
San Francisco 4, Calif.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and Trade Agreement involved	2
Statement	3
Reasons for granting the writ	6
The statute	8
The trade agreement	12
Conclusion	19
Appendix A	1a
Appendix B	12a

CITATIONS

Cases:

Altman v. *United States*, 224 U. S. 583	8
Bethlehem Motors v. *Flynt*, 256 U. S. 421	12
Minnesota v. *Barber*, 136 U. S. 313	12
Vernon Distributing Co. v. *United States*, 39 C.C.P.A. (Customs) 205	12

Statutes:

Internal Revenue Code of 1939, as amended:	
Section 2800(a)(1), 26 U.S.C. (1946 ed., Supp. V) 2800(a)(1)	2, 3, 6, 8, 12, 13, 16, 17
Section 2800(a)(5), 26 U.S.C. (1946 ed., Supp. V) 2800(a)(5)	9
Internal Revenue Code of 1954:	
Section 5001, 26 U.S.C. (1952 ed.) 5001	2
Section 5025(b), 26 U.S.C. (1952 ed.) 5025(b)	9
Sections 5171 to 5252	9
Revenue Act of 1951, Section 615, 65 Stat. 569	3
United States Code:	
Title 19, Sections 460, 467, 1311	9

TRADE AGREEMENTS: Page

General Agreement on Tariffs and Trade, 61 Stat. (Pt. V) A1249; id. (Pt. VI) A14-A15, A18, A2051; 62 Stat. (Pt. III) 3680 ..... 13a, 2, 3
Article II 13a, 4, 14
Article III 13a, 3, 5, 6, 7, 8, 13, 14, 15, 16, 17, 18
Protocol to 4
Schedule XX, Part I 14a, 5

MISCELLANEOUS:

Code of Federal Regulations, Vol. 26 (1940 Supp.), sections 186.148 and 186.149 3
Funk & Wagnalls New Standard Dictionary (1921 and 1947 eds.) 14
United States Tariff Commission Report No. 160, Vol. 55 (1949) 13
Websters New International Dictionary (1937 and 1947 eds.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

John R. Benney, on behalf of Bercut-Vandervoort & Co., Inc., prays that a writ of certiorari issue to review the judgment entered in this case on November 14, 1958, by the United States Court of Customs and Patent Appeals.

OPINION BELOW

The opinion of the United States Court of Customs and Patent Appeals (Appendix A, *infra*, p. 1a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on November 14, 1958 (Appendix A, *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

1. Whether section 2800(a)(1) of the Internal Revenue Code of 1939, as amended,[1] imposed an internal revenue tax on imported underproof gin in excess of the tax which it imposed in respect of the like domestic product, in violation of Article III, as amended, of the General Agreement on Tariffs and Trade.

2. Whether the Collector of Customs at the port of San Francisco should have assessed the tax on the imported gin on the proof-gallon basis or in a manner that would result in a tax not in excess of the tax imposed on the like domestic product on the proof-gallon basis.

STATUTES AND TRADE AGREEMENT INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939, as amended (26 U.S.C. (1946 ed., Supp. V) 2800(a)(1)), of the Revenue Act of 1951 (65 Stat. 569), and of the General Agreement on Tariffs and Trade, as amended (61 Stat. (Pt. V) A1249; id. (Pt. VI) A14-A15, A18; 62 Stat. (Pt. III) 3680), are set forth in Appendix B, *infra*, p. 12a.

[1] Section 2800 of the Internal Revenue Code of 1939, as amended, was superseded by section 5001 of the Internal Revenue Code of 1954, 26 U.S.C. (1952 ed., Supp. IV) 5001, which contains substantially the same language.

STATEMENT

In August 1952, petitioner imported into the United States from Holland through the port of San Francisco certain 90 proof "London dry gin" (R. 8, 193). The Collector of Customs at that port assessed an internal revenue tax on the imported gin on the basis of each wine gallon thereof at the rate of $10.50 per wine gallon under section 2800(a)(1) of the Internal Revenue Code of 1939, as amended (R. 7). Petitioner filed a timely protest against the assessment claiming that the tax had been improperly applied in that it exceeded in amount the tax imposed on the date of the General Agreement on Tariffs and Trade or on the date of the importation in respect of the like domestic product or in respect of an article from which the imported product had been manufactured or produced in whole or in part. The protest further claimed that the internal revenue tax should have been assessed on the basis of each proof gallon rather than on the basis of each wine gallon thereof. (R. 5-6.) Upon consideration of the protest, the Collector of Customs confirmed his assessment (R. 7) and the case was referred to the United States Customs Court in accordance with law (R. 8).

On January 1, 1948 when the General Agreement on Tariffs and Trade went into effect, section 2800(a)(1) of the Internal Revenue Code of 1939 laid a tax of $9 on each proof gallon, or wine gallon when below proof,[2] of distilled spirits produced in or imported

[2] A wine gallon is defined as a standard United States gallon containing 231 cubic inches. See section 186.148 of 26 C.F.R., 1940 Supp. A proof gallon is defined as a wine gallon containing 50 percent alcohol by volume and 50 percent water. See section 186.149 of 26 C.F.R., 1940 Supp. Therefore, a "proof gallon,"

into the United States. By the Revenue Act of 1951 (65 Stat. 569, Appendix B, *infra*, pp. 12a-13a; Congress amended section 2800(a)(1) of the Internal Revenue Code of 1939, raising the tax imposed by that section on distilled spirits from $9 to $10.50 per gallon, but provided in section 615 thereof that no amendment made by that Act should apply where its application would be contrary to any treaty obligation of the United States.

On the date of the instant importation Article II of the General Agreement on Tariffs and Trade (Appendix B, *infra*, p. 13a) provided that the products described in Part I of the Schedule relating to any contracting party imported from the territory of another contracting party should be exempt from ordinary duties and all other duties and charges in excess of those imposed on the date of that Trade Agreement, but permitted the importing country to impose, consistently with Article III, an internal tax equivalent to the internal tax imposed on the like domestic article or in respect of an article from which the imported product was manufactured or produced in whole or in part. Article III of the said Trade Agreement, (Appendix B, *infra*, p. 13a), which was tied into Article II thereof, provided that the imported product should not be subject directly or indirectly to internal taxes in excess of those applied directly or indirectly to like

---

which is also known as "100 proof," or as "proof," is 231 cubic inches of an equal mixture of alcohol and water. Thus, if the tax on the 90-proof gin involved here had been assessed on the basis of the proof gallon, the tax due would have been 90 percent of $10.50, or $9.45 for each wine gallon, instead of $10.50 as assessed by the Collector of Customs. The amount of the tax would necessarily change with each variation in the degree of the alcoholic content of the underproof gin being considered.

domestic products. Gin was described in Part I of Schedule XX, which applied to the United States. See Appendix B, *infra*, p. 14a. The protocol under which the United States acceded provisionally to the General Agreement on Tariffs and Trade provided that the provisions of Part II of the said Trade Agreement, which includes Article III thereof, should be enforced consistently with existing legislation. See 61 Stat. (Pt. 6) A2051.

The evidence adduced at the trial of this case in the United States Customs Court shows as follows: The imported gin and gin produced in the United States and sold in an underproof condition are alike in use, flavor, odor, and color (R. 39, 46-48, 55, 57). Domestic gin is distilled from neutral spirits of 190 or more proof together with botanicals, such as juniper, etc. (R. 67-69, 80, 98-99, 112). Domestic gin is always above 100 proof immediately after the distillation, and it is always withdrawn from bond and the tax paid on it while it is in the overproof condition (R. 79, 101, 103). The tax on the domestic gin is always assessed on the basis of the proof gallon (R. 78-79, 101). After the tax is paid on the domestic gin, it is reduced to below 100 proof by the addition of distilled water, and it is then packaged and placed on the market without further taxation (R. 68-72, 98-101, 115). If the domestic gin should happen to be inadvertently reduced to an underproof condition during its manufacture and should thereafter be withdrawn from bond in that condition, the tax would be assessed on it on the wine-gallon basis. But it is never consciously so made or so withdrawn from bond, and if it happens to be completed and withdrawn from bond in an underproof condition, it is wholly the re-

suit of a grievious error on the part of an employee. (R. 84, 101, 102, 114, 115, 116.)

The imported gin here involved was also made by redistilling neutral spirits of 190 or more proof together with botanicals and was about 178 proof immediately after it was redistilled. It was later reduced to 90 proof by the addition of water and was then bottled and exported to this country in the same underproof condition. Exhibits 8-A, 9-A, 9-B, R. 106-107.

The United States Customs Court, one judge dissenting, overruled the protest on the ground that section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, did not discriminate between imported and domestic distilled spirits (R. 168-192). On appeal, the court below affirmed, holding that section 2800(a)(1) applied uniformly and fairly to both imported and domestic distilled spirits; that the tax imposed on the domestic overproof gin was imposed directly on overproof distilled spirits and not indirectly on underproof gin; and that although domestic underproof gin was the like domestic product to be compared with the imported underproof gin, the tax imposed on the domestic product was not imposed directly or indirectly on the domestic underproof gin within the meaning of Article III of the General Agreement on Tariffs and Trade, and therefore not in contravention of that Article.

REASONS FOR GRANTING THE WRIT

The court below has improperly decided a highly important federal question concerning the correct construction and application of the international obliga-

tion of the United States contained in Article III of the General Agreement on Tariffs and Trade (Appendix B, *infra*, p. 13a), a provision specifically designed to cover national treatment of imports and to eliminate national discrimination in connection with the imposition of internal taxes on imported articles, a question which has not been but should be settled by this Court. The question decided by the court below looms large in its importance not only because the international obligation involved runs to the many nations who are parties to the General Agreement on Tariffs and Trade in which it appears,[3] but because the decision has the effect of diluting the international obligation of its force to the extent of rendering it largely nugatory. In addition, the decision has the effect of condoning artful evasion of an international obligation designed to eliminate discriminatory national practices which have for their purpose the protection of domestic industry by imposing higher internal taxes on imports than are imposed on like domestic products. And the error in the decision is rendered significant by the fact that discriminatory internal taxes such as are involved here, which the construction placed by the court below on the Trade Agreement upholds, are expressly condemned by the very language of the international obligation itself (See Paragraph 1 of Article III of the General Agreement on Tariffs and Trade, Appendix B, *infra*, p. 13a).

---

[3] Judge Donlon, the dissenting judge in the United States Customs Court, stated it to be a well-known fact that many thousands of cases bearing on the issue presented here are pending in that court (R. 191-192).

The opinion of the court below is erroneously based upon the primary foundation that the application of section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, did not discriminate against the imported product and in favor of the like domestic product within the meaning of Article III of the General Trade Agreement.[4] The opinion ignores both the realities that permeate the application of the statute and the language contained in the specific provision placed in the General Trade Agreement to cover national treatment of imported products and to assure that such imported products may enter national commerce bearing no heavier internal tax burdens than are borne by the like domestic products.

1. *The Statute.* Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, the substance of which is continued in the Internal Revenue Code of 1954 (See footnote 1, *supra*, p. 2), imposed a tax on each proof gallon, or wine gallon when below proof, of distilled spirits produced in or imported into the United States, the tax to be paid when the distilled

[4] The court below assumed that section 615 of the Revenue Act of 1951 (Appendix A, *infra*, p. 5a), which provided that no amendment made by that Act should apply where its application would be contrary to a treaty obligation of the United States, One of the amendments made by that Act was the amendment of section 2800(a)(1) raising the tax from $9 to $10.50 per gallon. It has long been held that the term "treaty" where used in an act of Congress includes a trade agreement, unless otherwise indicated by Congress. See *Altman v. United States*, 224 U.S. 583. It is clear, therefore, that Article III of the Trade Agreement is applicable to section 2800(a)(1), as amended, and that the Trade Agreement controls where the tax imposed is contrary to its provisions.

spirits should be withdrawn from bond.[5] As applied, the statute permits the domestic producers to withdraw their gin from bond while it is yet in an overproof condition, pay the tax on the proof-gallon basis and later reduce the alcoholic content to below proof by the addition of water and then market the underproof product without further taxation.[6] The bald result is that domestic underproof gin when it is sold in commerce has not borne a tax that has been computed on the wine-gallon basis for it would be unreasonable to assume that a domestic producer of gin would of his own accord withdraw his gin from bond in an underproof condition and pay a higher tax on it than he would otherwise be required to pay. In fact, there is ample evidence in the record to show that dometsic gin is never withdrawn from bond in an underproof condition unless it is the result of a grievous error on the part of an employee (R. 84, 101;

---

[5] The court below conceded that the classifications in the statute were established long ago for purely domestic purposes (Appendix A, *infra*, p. 5a). It is equally clear that the provision in the statute for the payment of the tax at the time the distilled spirits are withdrawn from bond is a provision more appropriately designed to fit into the bonded-distillery system established by law for the better control of collecting taxes on the products of domestic distillers (See sections 5171 to 5252, Internal Revenue Code of 1954, 26 U.S.C. (1952 ed.) 5171 to 5252) than it is to fit into the quite different system established for controlling the collection of tariff duties on imports, under which latter system the internal revenue taxes on imports are collected (see for example, 19 U.S. Code 460, 467, 1311).

[6] There is no rectification tax on gin produced by the redistillation of a pure spirit over juniper berries and other aromatics. See section 2800(a)(5) of the Internal Revenue Code of 1939 (26 U.S.C. (1946 ed.) 2800(a)(3)). See also section 5025(b) of the Internal Revenue Code of 1954 (26 U.S.C. (1952 ed.) 5025(b)) to the same effect.

102, 114, 115, 116). Hence, the stark reality of the situation is that domestic underproof gin never bears a tax that has been computed on the wine-gallon basis. On the other hand, section 2800(a)(1) affords imported underproof gin no such painless method of avoiding the higher tax. When imported gin arrives in the United States in the same underproof and packaged condition in which like domestic gin enters the national commerce, the imported gin is required by the statute, as applied, to pay a tax computed on each wine gallon thereof. Patently, it is impossible for an importer of underpoof gin to have his underproof importation taxed on the lower proof-gallon basis which the domestic underproof product in reality enjoys when it goes on the national market in competition with the import.

The blunt conclusions of the court below to the effect that section 2800(a)(1) affords an importer the same opportunity to obtain the lower proof-gallon tax as it affords the domestic producer (Appendix A, *infra*, p. 8a), and that the statute is applied equally and fairly to both domestic and imported distilled spirits alike, is but slavish adherence to the bare form of the statute, a statute so artfully drawn as to permit domestic evasion of a material part of it and still comply with its bare form. It is obvious that the domestic producer may, and universally does, at will manufacture and market underproof gin without paying a tax on the wine-gallon basis. It is equally obvious that an importer may not import underproof gin without paying the tax on the wine-gallon basis. He must, if he is to obtain a proof-gallon assessment, import proof or overproof distilled spirits, either neutral or in the form of overproof gin. Since underproof and over-

proof distilled spirits, as the court below holds, are distinct and different articles, it is clear that the importer is faced with crippling restrictions. He must import a product distinct and different from the article he desires to place on the market, a product distinct and different from the domestic product which is in competition with the product that he contemplates marketing. And he must, of course, import in bulk, for it would scarcely be economically feasible for him to purchase gin abroad already packaged in a proof or overproof condition and after importation restore it to bulk, subject it to the completing process, and then repackage the completed product for the United States market. It will be readily observed that in such costly and delaying procedures, deviations, and manipulations lies the only road open to him under the statute to obtain a proof-gallon assessment on his imported product and a tax no higher than the competing domestic product has borne when it enters the market. This cannot reasonably be said to be tax equality, for he can achieve the result only through substantial losses in dollars and time with which he would not be burdened if he had equality of opportunity.

There may also be other sacrifices between the importer and tax equality with the like domestic product. Imported merchandise may well be, and often is, such that the foreign producer of it has gained great prestige from his expertise and good will, so that products made and completed by him in his own plant abroad and bearing his name and indicia to the effect that it was produced and packaged by him in his own foreign plant will command a far greater market respect and financial return than will merchandise that has become

commonplace because it bears no praiseworthy name and because it has been manipulated by strangers after importation. Thus, it is beyond cavil that an importer, in order to obtain the tax advantage which the domestic product freely and universally enjoys, must indulge in impractical merchandise manipulations and substitutions, face substantial economical hindrances and losses, and indulge odious delays. Even then, his tax equality is but simulated, for he cannot import the product which he desires to place in the United States market and at the same time obtain a proof-gallon assessment of the tax.

We respectfully submit that if this statute does not discriminate against imported underproof gin and in favor of domestic underproof gin, it would be difficult to enact one that would have that result. Cf. *Minnesota* v. *Barber*, 136 U.S. 313, 323 and *Bethlehem Motors* v. *Flynt*, 256 U.S. 421.

2. *The Trade Agreement.* After holding that section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, had not been applied in a discriminatory manner to the imported underproof gin, the court below further held that the General Agreement on Tariffs and Trade involved here, which contains in Article III thereof an international obligation entitled the "National Treatment" provision,[7] is not different in substance with respect to national discrimination against imports from prior trade agreements which did not contain that provision, and that its previous decision in *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, construing

[7] This provision does not appear to have been placed in any prior trade agreement to which the United States was a party.

one of the prior trade agreements as not having been violated by the application of section 2800(a)(1), was controlling of the instant case. This holding with respect to Article III of the General Trade Agreement, we respectfully submit, strikes down an important international obligation of the United States and deprives it of its vitality. Article III of the General Trade Agreement, which the court below has all but obliterated, is a provision designed to prevent and eliminate the use of discriminatory internal taxes imposed on imports for the purpose of providing protection to national industries.[*] The postulate of that provision is that such discriminatory internal taxes may not be used even indirectly to afford protection to domestic industry, yet the court below has held that the use of the word "indirectly" in Article III does not make the Trade Agreement different in substance from prior trade agreements which did not contain the language of Article III or contain the word "indirectly" in any such context. This holding is wrong on its face, for it cannot be reasonably be said that a new provision in a trade agreement, obviously designed to achieve a result not theretofore attained by any trade agreement, means nothing and accomplishes

[*] The United States Tariff Commission, which is in close relation with trade agreement negotiations, in analyzing Article III of the General Trade Agreement, pointed out that the provisions for national treatment in the General Trade Agreement are broader than similar provisions in previous trade agreements and that:

> "* * * they include a commitment against the use of taxes not only on imported articles which are 'like' domestic articles but also on those which are not 'like' domestic articles but are directly competitive with or 'substitutable' for domestic products which are not similarly taxed."

See United States Tariff Commission Report 160, vol. 55 (1949).

nothing. Article III is uncontrovertibly an important international obligation of the United States and the decision of the court below plainly leaves it but an empty shell, for if the word "indirectly" contained therein means nothing, then artful methods for evading the obligation may be applied by any participating nation without fear of being called to task. The decision of the court below construing Article III, the said National Treatment provision of the General Trade Agreement presents, therefore, an important federal question which has not been but should be reviewed and settled by this Court.

It is clear that the decision of the court below construing Article III is erroneous. Article II of the General Trade Agreement provides that imports shall be exempt from all ordinary duties and all other charges of any kind in excess of those imposed on the date of the said Trade Agreement, but permits the importing country to impose on imports a charge equivalent[9] to an internal tax imposed consistently with Paragraph 2[10] of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part. Paragraph 2 of Article III, as amended,

[9] The term "equivalent" as used in Article II plainly means equal in value or amount. This comports with the definition of the word "equivalent" appearing in the dictionaries. See Funk and Wagnall's New Standard Dictionary (1921 and 1947 eds.); Webster's New International Dictionary (1937 and 1947 eds.).

[10] The language now appearing in Paragraph 2 of Article III was originally contained in Paragraph 1 of that Article. The amendment of Article III inserted new material as Paragraph 1 and renumbered the old Paragraph 1 as Paragraph 2. See 62 Stat. (Pt. 3) 3680.

provides that imported articles shall be exempt from internal taxes in excess of those imposed directly or indirectly on like domestic products. See Appendix B, *infra*, p. 14a.

The court below after recognizing that the imported underproof gin had been taxed on the basis of each wine gallon thereof (Appendix A, *infra*, p. 1a), conceded that it is the universal practice of domestic producers to withdraw their gin from bond while it is in an overproof condition and pay the tax on it on the proof-gallon basis before reducing its alcoholic content to below proof for marketing purposes (Appendix A, *infra*, p. 4a). It also assumed that the domestic underproof gin, which is in commercial competition with the imported underproof gin, is the "like domestic product" within the meaning of that term as used in Article III of the General Trade Agreement (Appendix A, *infra*, p. 14a). Despite these concessions, the court below concluded that the tax assessed on the imported underproof gin was not in excess of the tax imposed in respect of the like domestic product, *i.e.*, domestic underproof gin (Appendix A, *infra*, p. 7a):

This conclusion of the court below is based on the premise that proof and underproof distilled spirits are separate and distinct commodities. From this premise the court below went on to hold that the internal revenue tax paid on the domestic overproof gin on the proof-gallon basis is actually paid directly on overproof distilled spirits, a product separate and distinct from underproof gin. Hence, said the court, the tax paid on the domestic overproof distilled spirits is not paid indirectly on the domestic underproof gin, *i.e.*,

the like domestic product in this case, but is merely reflected in its price. This holding necessarily infers that the statute imposes no tax at all, directly or indirectly on domestic underproof gin derived from overproof gin, within the meaning of Article III of the General Trade Agreement. It is, of course, impossible to reconcile this holding and the holding that there was no violation of the Trade Agreement with the lower court's assumption that domestic underproof gin is the "like domestic product" within the meaning of Article III, for if it is the like domestic product and there was no tax imposed on it either directly or indirectly, Article III would exempt the instant import from the entire tax, or at least from the entire increase in the tax provided for by the 1951 amendment of section 2800(a)(1). Hence, even under the court's own considerations, its conclusion was wrong on its face, for if there was no tax at all on the like domestic product, the tax imposed on the instant imported underproof gin was clearly in excess of the tax imposed on the like domestic product, because the like domestic product bore no tax at all. Consequently, if the lower court's premises are sound, there was a plain violation of Article III when the tax was assessed on the instant importation.

Whether or not the premises on which the court below based its erroneous conclusion were sound, it is, we believe, reasonable to assume that the negotiators of the Trade Agreement contemplated that the import should pay no more tax than the like domestic product actually bears, through taxation of the product from which it is immediately derived, at the time it enters the market in competition with the corresponding imported product. A logical conclusion is that the nego-

tiators placed the word "indirectly" in Article III to cover just such a situation as is here presented, namely, a situation where a competing domestic article, not directly taxed, is permitted to enter the competitive market bearing only the weight of a tax that was imposed directly on the product from which it was immediately derived and where the corresponding imported article is required to pay a higher tax based on its condition and state of readiness for the market at the time of its importation.

We believe that harmony with the stated purpose of Article III of the General Trade Agreement requires that Article III be construed as contemplating that the internal revenue tax universally assessed on domestic overproof gin on the proof-gallon basis under section 2800(a)(1) is imposed *indirectly* on the like domestic product, namely, the domestic underproof gin that enters the national commerce in competion with imported underproof gin. This construction is plainly consonant with and will effectuate the purpose of Article III, stated by the negotiators in Paragraph 1 of that Article to be the prevention and elimination of discriminatory internal taxes which protect domestic industry, for it would cause the import to bear the same amount of internal tax as the like domestic product, in reality, bears when it is offered in competition with the import in the national commerce. We as well believe that it would be unreasonable to assume that the negotiators of the General Trade Agreement contemplated that imported products would have to be imported in an uncompleted condition or in the form of a separate and different article from that which is to be marketed, or that the importer thereof would have to face substantial and unusual economic

hazards and merchandise prestige sacrifices before his imported product would be entitled to have equal internal tax treatment with the like domestic product.

The decision of the court below necessarily has the effect of fostering artful evasion of a provision of the Trade Agreement the purpose of which is declared by the negotiators to be the prevention and elimination of discriminatory internal taxes that are imposed upon imports in a manner that affords protection to domestic industry. The decision likewise connotes that the negotiators labored long and brought forth nothing, and it seems to attribute to them a degree of carelessness that strikes a hard blow at the useful and serious purpose of international negotiation in the commercial field. In addition, the decision below is completely at war with the undeniable fact that the internal revenue tax assessed on the imported underproof gin in this case is in truth and reality in excess of the tax actually borne by the like domestic product. We respectfully submit, therefore, that the tax assessed on the instant import was in excess of that imposed indirectly on the like domestic product, namely, underproof gin, within the meaning of Article III of the General Trade Agreement. Hence, if Article III means anything, and it cannot reasonably be assumed to be an idle gesture, the assessment on the import in this case was in violation of it, and was plainly unauthorized. Unquestionably then, the court below erred and in so doing decided an important federal question in a manner that warrants review by this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN R. BENNEY,
Attorney for Petitioner.

FRANK L. LAWRENCE,
Of Counsel.

February 1959.

APPENDIX A

Date of Decision: Nov. 14, 1958

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

October Term 1958.

Customs Appeal No. 4937.
Customs Calendar No. 4.

BERCUT-VANDERVOORT & CO., INC., *Appellant*,

v.

THE UNITED STATES, *Appellee*.

MARTIN, Judge.

This is an appeal by the importer from the judgment of the United States Customs Court, Third Division, C.D. 1877, which overruled the protest against the assessment of internal revenue taxes on certain imported distilled spirits, to wit, 90 proof "London dry gin," imported from Holland and entered for consumption at the port of San Francisco on August 19, 1952, which assessment was levied at the rate of $10.50 per wine gallon under section 2800(a)(1) of the Internal Revenue Code of 1939, as amended by 65 Stat. 527.

No question is raised as to the rate or amount of regular customs duties assessed on the imported gin under paragraph 802 of the Tariff Act of 1930, as modified by the General Agreement on Tariffs and Trade (G.A.T.T.), T.D. 51802. Rather, the importer claims that the tax imposed under section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, is inapplicable in view of section 615 of the Revenue Act of 1951, 65 Stat. 569, since such application is claimed to be contrary to the obligations assumed by the United States in Articles II and III of the G.A.T.T., to wit, that the tax imposed on the imported under proof gin should not exceed that applied "indirectly," to like domestic products and that, therefore, the tax should have

been assessed on the basis of the number of proof gallons equivalent to the imported wine gallon merchandise.[1]

Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, provided, in part, at the time of importation:

> There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. * * *

Section 615 of the Revenue Act of 1951, 65 Stat. 569, entitled "Treaty Obligations," reads as follows:

> No amendment made by this Act shall apply in any case where its application would be contrary to any treaty obligation of the United States.

The pertinent provisions of G.A.T.T. as amended (T.D. 51802 and T.D. 52167), prior to the date of liquidation herein are as follows:

Article II

> 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product (a) a charge equivalent to an internal tax imposed consistently with the provisions of

[1] A standard United States gallon contains 231 cubic inches. 26 CFR (1949 Ed.) Section 186.148. A standard United States gallon containing 50 per cent alcohol by volume and 50 per cent water by volume would be 100 proof spirits which gallon of 100 proof spirits is known as a proof gallon. 26 CFR (1949 Ed.) Section 186.149. The terms "proof gallon," "100 proof" or "proof spirits" are used interchangeably herein. The terms "over proof" or "above proof" refer to spirits containing more than 50 per cent alcohol by volume whereas the terms "under proof gallon" or "wine gallon" are used to refer to a standard United States gallon containing less than 50 per cent alcohol by volume.

paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part; * * *

"Article III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The evidence establishes that the imported merchandise was produced from grain neutral spirits of approximately 190 proof by redistillation and the subsequent dilution with botanicals and water until the alcoholic content was reduced to 90 proof. The product was then bottled and imported in that condition. The tax in question is imposed on this merchandise on the wine gallon basis.

The importer presented evidence below showing that it is the practice of domestic producers to withdraw the distilled spirits from bond while over proof, to pay the tax thereon on the proof gallon basis, and to thereafter further dilute the spirits to approximately 90 proof prior to bottling and marketing the product. The importer further proved the similarity between domestic under proof gin

and the imported product with respect to taste, odor, and color. It was the importer's claim below which it strenuously renews here, that the assessment under section 2800 (a)(1) of the Internal Revenue Code upon the imported 90 proof gin on the wine gallon basis subjects the imported product to "internal taxes * * * in excess of those applied * * * indirectly, to like domestic products," in contravention of Article III, section 2 of G.A.T.T., since the domestic 90 proof gin has allegedly "indirectly" received a tax advantage because the domestic under proof merchandise is taxed indirectly on the basis of the proof gallon.[2]

In overruling the importer's protest, the Customs Court, one judge dissenting, held that section 2800(a)(1) did not discriminate between the imported and domestic products within the meaning of Article III of G.A.T.T., *supra*, but that the statute merely laid a different rate of tax on two distinct classes of merchandise, viz. (1) proof or over proof spirits, (2) under proof spirits, in either of which classes the importer was free to enter its product. In support of that view, the trial court relied on *Bohemian Distributing Co. et al. v. United States*, 15 Cust. Ct. 121, C.D. 957, appeal dismissed May 29, 1946, and *Vernon Distributing Co. v. United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463.

In the view we take of this appeal, we shall assume arguendo that it is the universal practice of domestic producers of 90 proof gin to withdraw the product from bond when over proof and to pay the tax on the proof gallon basis prior to diluting same to the 90 proof gin, although in one instance a domestic manufacturer was assessed on the wine gallon basis. We shall further assume that

[2] The domestic 90 proof distilled spirits, when taxed on the proof gallon basis prior to reduction (dilution) are alleged to have been indirectly assessed at 90 per cent of $10.50, or $9.45 for each wine gallon after reduction instead of $10.50 as assessed by the collector upon each wine gallon of imported 90 proof distilled spirits.

G.A.T.T. creates an international obligation which is applicable to section 2800(a)(1) of the Internal Revenue Code of 1939 as amended by the Revenue Act of 1951, and to section 615 of that Act. Accordingly, we need only determine whether the assessment under section 2800(a)(1) on the imported merchandise is in excess of that applied "directly or indirectly" to the like domestic product contrary to the cited portions of G.A.T.T.

In order to resolve the issue, a discussion and analysis of section 2800(a)(1) and its application should be helpful. That section levies the tax on "distilled spirits in bond or produced in or *imported into* the United States." (Emphasis ours.). The subject of the tax is "distilled spirits" whether produced in the United States or imported into this country. The rate of tax under that section at the time of the importation of the instant merchandise was $10.50 on each proof gallon or wine gallon when below proof." Thus, there exist in the statute two classifications of distilled spirits, proof gallon and below proof or wine gallon. Those classifications were established by the Congress in 1868 for purely domestic purposes and have been retained in substance each time the Congress has considered this subject. 15 Stat. 125 (1868); Rev. Stat. § 3251 (1875); 40 Stat. 1105 (1919), as amended, 26 U.S.C. § 2800 (a)(1). Each classification creates a separate and distinct commodity and the tax is levied on each one.

The tax attaches to the domestic distilled spirits when they are produced and the tax is payable when they are withdrawn from bond, *according to their proof at that time*. 26 U.S.C. § 2800 (a)(1) and (c). *Rogan, Collector v. Conterno*, 132 F.2d 726 (CCA 9, 1943). If not placed in a bonded warehouse, the tax is immediately due and payable. 26 U.S.C. 2800(b)(2). The tax attaches to imported distilled spirits at the time of importation, *United States v. Westco Liquor Products Co.*, 38 C.C.P.A. (Cus-

toms) 101, C.A.D. 446, and is payable *according to its proof* when entered into the United States in conformity with the doctrine that all imported products are dutied according to their condition when imported. *United States v. Citroen*, 223 U.S. 407; *Leonard Levin Co. v. United States*, 27 C.C.P.A. (Customs) 101, C.A.D. 69. Applying those principles, the collector in this case taxed appellant's under proof spirits according to the provisions of the statute. If appellant's products had been imported as proof spirits or merchandise in over proof condition, it would doubtless have been taxed accordingly.

The collector applied the provisions of the Internal Revenue Code to the imported spirits by the same standards that he uses in applying the act to domestic spirits. Certainly, that procedure was in accordance with the provisions of G.A.T.T. As Article II, section 2, provides:

> 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part; * * *

Appellant lays great stress on the theory that, since the domestic producer invariably withdraws his spirits from bond at 100 proof or in over proof condition, the spirits are taxed on the proof gallon basis, and thereafter the spirits are reduced to a percentage of alcohol below proof; that by such procedure the under proof spirits are "indirectly" receiving the advantage of the tax applied on the proof gallon basis. It is contended, therefore, that the provision of G.A.T.T. that

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to the internal taxes or other internal charges

of any kind in excess of those applied, directly or indirectly, to like domestic products, * * * (Art. III, section 2, *supra.*)

has been violated."

In this instance however, the collector has not applied directly or indirectly internal taxes to the foreign commodity in excess of those applied indirectly to the like domestic product. Assuming that the "like domestic product" is, as has been urged by appellant, the domestic under proof spirits in commercial competition with the foreign commodity, we fail to see how any tax is applied "indirectly" to the domestic spirits. It is, of course, true that the price of domestic under proof spirits will *reflect* the direct tax imposed upon the over proof spirits from which they are made, but so it is with any article of commerce which is derived from a different commodity which has been taxed theretofore. The instant tax is rather assessed "directly" upon *different* merchandise on a basis dependent upon the physical condition when withdrawn from bond or imported into this country. The collector merely applied the tax to the merchandise in the condition in which he found it at the time the tax accrued in accordance with the provisions of the statutes. The domestic producer controls the composition of his products in the same fashion that the importer can control the composition of his product when he imports it. He can import proof or over proof spirits and have the commodity taxed accordingly. The provisions of the act are applied uniformly to the merchandise of the domestic producer and importer alike. Appellant contends that the foreign producer is placed in a disadvantageous position if he exports proof or over proof spirits to this country because he is required to undergo extra expense to reduce the alcohol content and to bottle his product when it reaches this country. Also, if he is compelled to bottle in the United States he loses the great advantage of bottling his under proof spirits in Europe for export to this country.

The record is silent as to the cost to rectify and to bottle spirits in this country. In addition, there is nothing in the record to establish the advantage of marketing spirits which have been bottled in a foreign country. Even if appellant had evidence supporting his contention we would deem it irrelevant to the present issue.

In view of our determination that the provisions of the Internal Revenue Act have been applied equally and fairly to both domestic and imported spirits alike, section 2 of Article III of G.A.T.T., *supra*, has not been contravened. Therefore, section 615 of the Revenue Act of 1951, 65 Stat. 569, *supra*, can not be applied to section 2800 (a)(1) of the Internal Revenue Code of 1939, as amended, so as to invalidate the collector's action.

As stated by the Customs Court, Section 2800 of the Internal Revenue Code has previously been construed in connection with other trade agreements by it as well as by this court. *Bohemian Distributing Co., et al.* v. *United States, supra. Vernon Distributing Co.* v. *United States, supra.*

Trade agreements with Canada (T.D. 48023, T.D. 49752) and with the United Kingdom (T.D. 49753), were involved in the *Bohemian* case. Those trade agreements have the same purpose as the provisions of G.A.T.T., i.e., to prevent discrimination against imported merchandise. The United Kingdom agreement reads in part as follows:

> Article III (T.D. 49753)
>
> Articles the growth, produce or manufacture of the territories of either High Contracting Party shall, after importation into the territories of the other, be exempt from all internal taxes, fees, charges or exactions other or higher than those payable on or in connection with like articles of domestic or any other origin, * * *.

In that case imported under proof whisky was taxed on the wine gallon basis, whereas the evidence showed that

domestic under proof whisky withdrawn from bond above proof and taxed on the proof gallon basis would have been taxed on the wine gallon basis if it had been withdrawn from bond below proof. The court held that two different products were involved; imported below proof whisky and domestic above proof whisky, and therefore, when the collector taxed the domestic above proof whisky on the proof gallon basis and the imported below proof whisky on the wine gallon basis, the trade agreements were not violated.

In the *Vernon Distributing Company* case, *supra*, which involved below proof rum imported from Cuba, this court was called upon to construe section 2800(a)(1) in relation to a trade agreement with Cuba, T.D. 50050. That agreement provided:

> 5. The provisions of Article I and Article III of this Agreement and of the third paragraph of this Article shall not prevent the Government of the United States of America from imposing at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been manufactured or produced in whole or in part.

This court, in holding that this trade agreement was not contravened because imported under proof spirits were taxed on a different basis than domestic proof or over proof spirits, stated at page 211:

> Whether or not the laws of Cuba render it necessary to produce rum at "more than proof"—that is, as we understand it, having more than 100 parts alcohol—we are not advised, but from the stipulation, *supra*, it appears that the particular rum here involved was produced in Cuba by a process of distillation so that it was 160 degrees proof or over. Had it been imported into this country in that condition as it might have been, it would have been assessed with an internal revenue tax upon the proof or degree

basis, precisely the same basis as that applied in the case of a domestic product. The statute so provides where alcoholic degrees of 100 or more are made the measuring factor.

However, the rum was not imported in its distilled condition. By means of water it was reduced in strength to an 89 degree alcoholic content and imported in that condition. By the terms of the statute therefore, it became subject to wine gallon measure just as domestic rum would be if no internal revenue tax were imposed upon it until after its alcoholic strength had been reduced to less than 100 degrees by the addition of water.

Appellant contends that these cases are distinguishable from the case at bar because the language of the trade agreements therein is different from the language in G.A.T.T. Even so, we find no such distinguishing features. All the agreements were drawn and negotiated to prevent discrimination against imported products either directly or indirectly. The statute and facts involved in the cases cited were substantially the same as in the case at bar. The courts found that the agreements were not contravened. The mere use of the word "indirectly" in G.A.T.T. does not make the agreement different in substance from the agreements in the *Bohemian* and *Vermut* cases, *supra*. The collector could not have "indirectly" contravened those agreements either, for it is a cardinal principle of law that that which cannot be done directly cannot be done by indirection; if the word "indirectly" had been used in the agreements in the same context as in G.A.T.T., we believe that the decisions reached would have been no different.

The appellant cites *Parrott & Co. v. United States*, 150 F. 2d 943, in support of its position. That case involved rum distilled in the Virgin Islands at more than 100 proof and later by the addition of water reduced to less than 100 proof. Subsequently, the rum in that condition was shipped to the United States.

The court, in holding that the rum should be taxed on a proof gallon basis, stated:

> The rums here in issue being distilled in the Virgin Islands were without any requirement that they remain in a federal bonded area until the tax is paid. Congress well knew this when it provided in Section 3350 *that the rum was to be taxed as if produced in the United States.* It must have intended that the tax would be the equivalent of that provided by Section 2800(b)(2) for distilled liquors not deposited in bonded warehouses, that it is the amount which would have attached as soon as the distillation was complete—here because above proof at the proof gallon rate. Cf. St. Paul Mercury Indemnity Co. v. United States, supra. (Emphasis ours.)

Since the court based its decision on the proposition that "the rum was to be taxed as if produced in the United States," that case is not controlling here.

In conclusion, we are of the opinion that since the statute has classified distilled spirits in two categories (1) distilled spirits above proof and (2) distilled spirits below proof and established a rate of tax for each such classification, the consistent and uniform application of the statute to domestic distilled spirits and imported distilled spirits does not contravene the provisions of G.A.T.T., and that the record herein reveals nothing which would warrant a different procedure than that adopted by the collector.

For the foregoing reasons the judgment of the Customs Court is *affirmed*.

AFFIRMED

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Friday, November 14, 1958.

At a session of said court continued and held at the City of Washington, pursuant to adjournment, on this 14th day of November, A. D., 1958.

Present the Honorable Ambrose O'Connell, Acting Chief Judge, and the Honorables Eugene Worley, Giles S. Rich, and I. Jack Martin, Associate Judges.

The court was opened for business in due form.

Customs Appeal No. 4937

BERCUT-VANDERVOORT & CO., INC., *Appellant*,

v.

THE UNITED STATES, *Appellee*.

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, affirmed.

APPENDIX B

The pertinent provision of the Internal Revenue Code of 1939, as amended, read as follows:

> Section 2800(a)(1). There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. (26 U.S.C. (1946 ed., Supp. V) 2800(a)(1).

The pertinent provision of the Revenue Act of 1951 (65 Stat. 569) read as follows:

> Section 615. No amendment made by this Act shall apply in any case where its application would be contrary to any treaty obligation of the United States.

The pertinent provisions of the General Agreement on Tariffs and Trade, as amended, read as follows at the time of the instant importation:

ARTICLE II

1. * * * (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

* * * * * * * * * *

(61 Stat. (Pt. V) A14-A15.)

ARTICLE III

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. (61 Stat. (Pt. VI) A18; 62 Stat. (Pt. III) 3680.)

SCHEDULE XX—Part I.

Tariff Act of 1930 paragraph	Description of Products	Rate of duty
802	Slivowitz and all other brandy, gin, cordials, liquers, kirschwasser, and ratafia	$1.25 per proof gal.

(61 Stat. (Pt. V) A1249.)

FILE COPY

No. 693

Office-Supreme Court, U.S.
FILED
MAR 12 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes and treaty involved	2
Statement	4
1. Internal Revenue Code and the General Agreement on Tariffs and Trade	5
2. This litigation	6
Argument	8
Conclusion	10

CITATIONS

CASES:	
Bohemian Distribution Co., et al. v. *United States*, 15 Cust. Ct. 121, C.D. 957	6, 9
Vernon Distributing Co. v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463	5, 6, 9
STATUTES AND TREATY:	
Act of July 20, 1868, 15 Stat. 125	5
General Agreement on Tariffs and Trade:	
Article II, 61 Stat. (Part V) A14	2
61 Stat. (Part V) A15	2
Article III, 61 Stat. A18, as amended, 62 Stat. (Part III) 3680	3, 5, 6
Internal Revenue Code of 1939, as amended, 56 Stat. 970, 971 (now Sec. 5001(a) of the Internal Revenue Code of 1954, as amended, 69 Stat. 14):	
Sec. 2800(a)(1)	2, 4, 5, 8
Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part VI) A2051	4, 6, 8
Revenue Act of 1918, 40 Stat. 1057, Sec. 600(a)	5
Revenue Act of 1951, Sec. 451, 65 Stat. 524	5

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 693

BERCUT-VANDERVOORT & CO., INC., *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Customs Court, Third Division (R. 168-192), is reported at 38 Cust. Ct. 285, 151 F. Supp. 942. The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on November 14, 1958

(Pet. App. 11a). The petition for a writ of certiorari was filed on February 10, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the General Agreement on Tariffs and Trade requires the Internal Revenue Code tax on distilled spirits to be applied to imported 90 proof gin on the basis of alcoholic content as it is to gin of higher than 100 proof.

STATUTES AND TREATY INVOLVED

Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, provided:

> There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. * * *

Article II of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A14, provides in pertinent part:

> 1. * * * (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any

kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

* * * * *

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 1 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

* * * * *

Article III of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A18, as amended, 62 Stat. (Part III) 3679, provides in pertinent part:

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic prod-

> ucts. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part VI) A2051, provides in pertinent part:

> 1. The Governments of * * * the Kingdom of the Netherlands * * * and the United States of America, undertake, provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than November 15, 1947, to apply provisionally on and after January 1, 1948:
>
> a) Parts I and III of the General Agreement on Tariffs and Trade, and
>
> b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

STATEMENT

In August, 1952, the petitioner imported from the Netherlands a shipment of 90 proof London dry gin (R. 6, 8). The Collector of Customs at San Francisco assessed an internal revenue tax of $10.50 per wine gallon in accordance with Section 2800(a)(1) of the Internal Revenue Code of 1939, as amended, 56 Stat. 970, 971 (now Section 5001(a) of the Internal Revenue Code of 1954, as amended, 69 Stat. 14) (R. 5, 7). The petitioner protested this assessment, claiming that the proper rate of tax was $10.50 per proof gallon ($9.45 per wine gallon), on the ground that otherwise it would exceed the internal revenue tax on "like" domestic products and consequently violate Part II.

Article III, of the General Agreement on Tariffs and Trade, 61 Stat. (Part V) A18, as amended, 62 Stat. 3680. (R. 5-6). The Collector reviewed his assessment but adhered to his original determination on the basis of *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463 (R. 7).

1. *Internal Revenue Code and the General Agreement on Tariffs and Trade.* a. Section 2800 (a)(1) of the 1939 Internal Revenue Code, as amended, imposed a tax of $10.50 per gallon upon distilled spirits of 100 proof or less, with a proportionate addition for proof above 100. Payment was due as soon as the spirits were produced or, if they were imported into the United States, at the time of importation. However, if the spirits were immediately placed in a bonded warehouse upon production or importation, the tax could be postponed until they were withdrawn from bond. This scheme of taxation, involving a flat rate for spirits of 100 proof or less ("wine gallon" rate), and a graduated rate for overproof spirits ("proof gallon" rate), has been a part of internal liquor taxation for almost a century. See Act of July 20, 1868, 15 Stat. 125. Similarly, the time for payment of the tax upon domestic and imported liquors, prescribed by Section 2800(a)(1), long antedated the General Agreement on Tariffs and Trade. See Section 600(a) of the Revenue Act of 1918, 40 Stat. 1057, 1105. Only the amount of the tax has been varied by intervening tax acts.[1]

b. The General Agreement on Tariffs and Trade provides that imports into the United States from other

[1] *E.g.*, the Revenue Act of 1951 raised the basic tax from $6.00 per gallon to $10.50.

contracting nations "shall not be subject, directly or indirectly, to internal taxes * * * in excess of those applied, directly or indirectly, to like domestic products". 62 Stat. (Part III) 3680. However, the Agreement expressly permits the signatory nations to impose upon imports a "charge" equivalent to the internal tax imposed upon "like" domestic products. 61 Stat. (Part V) A15. And, while these Agreement provisions are to be applied "to the fullest extent", they are expressly subject to any "existing legislation". Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 61 Stat. (Part VI) A2051.

2. *This litigation.* At trial, the petitioner's witnesses testified that the practice of domestic distillers is to place overproof gin in bond (R. 79, 101, 103). When the gin is removed from bond the tax is paid on the basis of proof gallons (R. 79, 101). The overproof spirits are then reduced to 90 proof by dilution and marketed without further federal taxation (R. 72). In addition, the petitioner's witnesses stated that domestic and imported 90-proof gins are similar with respect to taste, odor and color (R. 74, 115).

The Customs Court, one judge dissenting, relying upon *Bohemian Distributing Co., et al.* v. *United States*, 15 Cust. Ct. 121, C.D. 957, and *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463, overruled the petitioner's protest (R. 168-192). It reasoned that the "like" domestic products with which the imports are to be compared to test for tax equivalence are underproof domestic distilled spirits at the time the tax upon them is payable. Since both the imported underproof spirits and domestic underproof spirits are taxable on the wine-gallon basis, the court held that

"there is no discrimination against the foreign product" (R. 177). Indeed, the court observed, to permit underproof imported spirits to be taxed on a proof-gallon basis would discriminate *in favor of* the imported product (R. 180-181). This is because the domestic producer who chooses to pay the tax before diluting the gin to 90 proof, loses the taxes paid if the gin is lost or destroyed between the time it is removed from bond and the time it is marketed. The foreign producer, though, would not assume this risk. Moreover, the court pointed out, the foreign producer may export overproof distilled spirits to the United States and, just like the domestic distiller, dilute them after paying the internal revenue tax on the proof-gallon basis (R. 180).

In a dissenting opinion, Judge Donlon concluded that the tax upon imported underproof spirits operates indirectly to discriminate against imported 90 proof London dry gin (R. 181-192).

The Court of Customs and Patent Appeals unanimously affirmed (Pet. 1a-11a). It held that the section did not assess against imported distilled spirits a greater tax, directly or indirectly, than that assessed against like domestic products because the tax is "assessed 'directly' upon *different* merchandise on a basis dependent upon the physical condition when withdrawn from bond or imported into this country" (Pet. 7a). The court also stressed that the foreign producer, just like the domestic distiller, can control the alcoholic content of his liquor so as to be either underproof or overproof on the tax date (Pet. 7a).

ARGUMENT

The General Agreement on Tariffs and Trade prohibits signatory nations from subjecting imports, directly or indirectly, to internal taxes in excess of those applied to like domestic products. *Supra*, pp. 2-4. The courts below, consonant with prior decisions construing similar provisions in other international trade agreements, have held that the internal tax provided by Section 2800(a)(1) is imposed equally upon "like" imported and domestic distilled spirits. That decision is correct and further review by this Court is not warranted.[2]

1. The only distinction among distilled spirits which is drawn by Section 2800(a)(1) is based not upon the place of production but upon alcoholic content, *i.e.*, distilled spirits of less than 100 proof are taxed on the wine-gallon basis while the tax upon distilled spirits of 100 or higher proof is computed by proof gallons. Nevertheless the petitioner contends that the tax upon its underproof London dry gin should be assessed as if the gin were higher than 100 proof.

Acceptance of this theory would introduce into the Internal Revenue Code an unnecessary fiction, squarely conflicting with the clear terms of Section 2800(a)(1). For one thing, the General Agreement on Tariffs and Trade does not require 90 proof imported London gin to be taxed on the basis of alcoholic content merely

---

[2] Since the Court of Customs and Patent Appeals held that Section 2800(a)(1), as applied, did not constitute a violation of the General Agreement, it did not reach the question of whether the Agreement was, in fact, applicable to that section. In view of the limitation concerning "existing legislation" found in the Provisional Protocol, we believe that the Agreement is inapplicable to Section 2800(a)(1), at least to the extent of the tax in effect on January 1, 1948.

because gin of more than 100 proof is so taxed. Rather, the Agreement merely prohibits unequal taxation on "like" imported and domestic products. And while all distilled spirits, regardless of proof, possess certain similarities, the distinction, inherent in internal revenue statutes for almost a century, between underproof and overproof spirits is altogether reasonable and serves to describe unlike products.

2. The petitioner suggests that the question of the proper tax base for imported underproof distilled spirits is novel because the General Agreement's prohibition against unequal internal taxes "does not appear to have been placed in any prior trade agreement to which the United States was a party" (Pet. 12). However, as the petitioner implicitly recognizes, the Cuban reciprocal trade agreement involved in *Vernon Distributing Co.* v. *United States*, 39 C.C.P.A. (Customs) 205, C.A.D. 463, was in all essentials the same as the General Agreement, except that it did not include the phrase "directly or indirectly" in prohibiting discrimination, by unequal internal charges, against imported products (Pet. 12-13). Similarly, the Canadian and English agreements which were construed in *Bohemian Distributing Co.* v. *United States*, 75 Cust. Ct. 121, C.D. 957, were essentially identical to G.A.T.T., with the same reservation. In both of these cases, it was held that the Internal Revenue Code did not discriminate against imported underproof distilled spirits. The petitioner's stress upon the word "indirect" in attempting to distinguish the *Vernon* case is unwarranted since one of the obvious purposes of the Cuban agreement, as well as of the Canadian and English agreements involved in *Bohemian Distributing*, was

precisely that of the General Agreement, *i.e.*, to ensure that imported goods would not be subjected to disparate internal taxes.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

MARCH, 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959—4990 E/P 0-1151